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No. 97-187

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SANDRA S. NELSON,
Petitioner,

v.

McCLATCHY NEWSPAPERS, INC.,
and TACOMA NEWS, INC.,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Washington Supreme Court correctly hold that Wash. Rev. Code 42.17.680(2) violates the First Amendment when applied to prohibit a newspaper from requiring that its reporters not engage in political activity that could compromise the credibility or actual or perceived objectivity of the newspaper's news coverage?

RULE 29.6 LISTING

Pursuant to Rule 29.6, Tacoma News, Inc., a Washington corporation, is a wholly-owned subsidiary of McClatchy Newspapers, Inc., a Delaware corporation. La Voz, LLC, is a California limited liability corporation owned 50% by McClatchy Newspapers, Inc. McClatchy Newspapers, Inc. also wholly owns Newsprint Ventures, Inc., a California corporation, which in turn wholly owns Wingate Paper Company, a Delaware corporation; Newsprint Ventures, Inc. and Wingate Paper Company own, respectively a 10% and a 3.5% interest in Ponderay Newsprint Company, a partnership.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
The News Tribune's Conflict of Interest Standards	3
Nelson's Transfer	5
Procedural Background	6
REASONS THE WRIT SHOULD BE DENIED	7
I. THE WASHINGTON SUPREME COURT'S DECISION IS CONSISTENT WITH, AND FOLLOWS FROM, THE DECISIONS OF THIS COURT	7
A. Courts Consistently Interpret the First Amendment to Protect Newspapers' Editorial Discretion to Control the Objectivity, Presentation and Content of Their News Coverage	7
B. The News Tribune Did Not Assert, Nor Did the State Court Find, That Newspapers Are Immune From the Application of General Laws	10
II. THE WASHINGTON SUPREME COURT'S DECISION WAS NARROWLY TAILORED TO ENSURE A NEWSPAPER'S ABILITY TO PROTECT THE CREDIBILITY AND OBJECTIVITY OF ITS NEWS COVERAGE FROM A REPORTER'S POLITICAL ACTIVISM	13

TABLE OF CONTENTS—Continued

Page

A. The Washington Supreme Court's Decision Does Not Threaten the Applicability of General Antidiscrimination Laws to Newspapers 14

B. The Ability to Control Actual and Perceived Objectivity Lies at the Heart of a Newspaper's Editorial Control and Judgment 16

1. Integrity and Credibility Are Core Objectives of Constitutionally Protected Editorial Control and Judgment 16

2. First Amendment Protection Does Not Depend on Proof That a Reporter's Political Activism Negatively Impacts the Credibility of a Newspaper's News Coverage 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES — Page

Associated Press v. NLRB, 301 U.S. 103 (1936) ....*passim*
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 21
Columbia Broadcasting Sys. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) 8, 9, 21
Hausch v. Donrey of Nevada, Inc., 833 F. Supp. 822 (D. Nev. 1993) 14
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338 (1995) .. 8
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 8, 13, 20
Newspaper Guild of Greater Philadelphia v. N.L.R.B., 636 F.2d 550 (D.C. Cir. 1980) 9, 18
Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C. Cir. 1984) 9, 12, 13
University of Pennsylvania v. Equal Employment Opportunity Comm'n, 493 U.S. 182 (1990) 16, 17, 20
U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers, 412 U.S. 565 (1973) 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 1 .....*passim*

STATUTES

Wash. Rev. Code 42.17.680 .....6, 7, 13

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The Washington Supreme Court, in reliance on the decisions of this Court and other federal courts, concluded that the First Amendment to the United States Constitution protects the ability of newspapers to ensure the credibility and objectivity of their news coverage by requiring that reporters not engage in high profile, publicly visible political activism. Respondents McClatchy Newspapers, Inc., and Tacoma News, Inc., publisher of *The News Tribune* (collectively "The News Tribune" or "TNT") applied ethical standards that limit such conflicts

of interest, and the state court concluded that a state law prohibiting employment decisions based on an employee's refusal to remain politically abstinent could not be constitutionally applied to newspaper reporters. Appellant Sandra S. Nelson ("Nelson") challenges that decision as inconsistent with the decisions of this Court and as threatening to undermine state and federal protections against employment discrimination.

Nelson's Petition for Writ of Certiorari ("Petition") relies entirely on mischaracterizations of the decision below and misinterpretations of this Court's First Amendment jurisprudence. The Washington Supreme Court's decision is limited to a newspaper's right to enforce neutral conflict of interest standards to protect its editorial control and judgment over the presentation and content of its news coverage—control and judgment this Court and other courts have repeatedly held to be within the protections of the First Amendment. The News Tribune's ethical standards, moreover, address only the publicly visible political *conduct* of newspaper reporters, and The News Tribune has not sought, nor did the state court address (much less sanction), applicability of these standards to employment decisions based on race, gender, national origin, or any other immutable physical characteristic. In short, the state court's decision closely follows this Court's decisions and is narrowly focused on conflicts of interest that arise between a reporter's partisan political activism and a newspaper's efforts to ensure the integrity of its news content. Nelson identifies no reasonable basis on which the Court should accept review of the Washington Supreme Court's decision, and The News Tribune, therefore, urges the Court to deny the petition for writ of certiorari.

STATEMENT OF THE CASE [1]

The News Tribune is the third largest newspaper in the State of Washington with a daily and Sunday circulation of approximately 130,000 and 150,000, respectively. Nelson was employed as a reporter by Respondents' predecessor and was hired as a reporter after Respondents acquired the newspaper. She covered the newspaper's "education beat," which included researching and writing stories concerning the Tacoma School District and other school districts, as well as legislative and regulatory developments at the state level involving education issues. Nelson rotated weekend duty with other News Tribune reporters and was responsible for covering whatever story came up during her shift, regardless of subject matter.

The News Tribune eventually learned that Nelson participated in a wide range of political activity while she was a reporter. She is a member, and participated in the activities, of Tacoma Radical Women, a feminist socialist organization, and the Freedom Socialist Party. Her participation included being the organizer for Tacoma Radical Women and organizing and/or attending political forums, demonstrations, and classes for various political causes and also included highly visible support of lesbian and gay rights and abortion rights, such as participating in public demonstrations, and working in a leadership role on public initiative campaigns.

The News Tribune's Conflict of Interest Standards.

A fundamental goal of The News Tribune is to report news in an objective and unbiased manner. The news-

[1] The News Tribune's summary of the relevant facts is derived from the Washington Supreme Court's opinion and The News Tribune's briefs to the Washington Supreme Court, without record citations. All of these facts, however, are contained in the declarations and deposition excerpts attached to the motions for and opposition to partial summary judgment that comprise the record before the state courts.

paper also makes every effort to ensure that its readers perceive the news it prints as objective and written from an unbiased viewpoint. Accordingly, The News Tribune, like most daily newspapers, requires that the persons it employs as reporters not engage in political or other activity that could cause actual or perceived conflicts of interest (referred to throughout this brief as "political activism") —in other words, activity that if known by the newspaper's readers, might lead them to believe that the news is biased as a result of that reporter's involvement in covering a particular story or that The News Tribune generally sponsors, adopts, or otherwise is influenced by the reporter's political affiliations.

Minimizing reporters' potential conflicts of interest is particularly important in light of their central role in gathering, writing, and presenting the news. As former Assistant Managing Editor Jan Brandt explained:

> The reporter brings the information into the newsroom from the outside. The reporter is the ears and eyes of the story. The editor has to trust the reporter that that is indeed what occurred and how it occurred and where it occurred. The . . . editor . . . can ask for additional information, can ask for balance in a story, can ask for both sides of the story, can question facts, but basically it is a trust relationship between the editor and the reporter.

The News Tribune evaluates potential conflicts of interest on a case-by-case basis. Ms. Brandt stated that the editors "gather the facts from the people involved and discuss the concept and the problem and try to reach an equitable solution." The editors also refer to national ethics codes, such as the Associated Press Managing Editors' Ethics Code or Society of Professional Journalists' Ethics Code, and may consult with peers in the industry for their experience and insight.

Nelson's Transfer.

In 1987, Nelson met with Assistant Managing Editor Jan Brandt and Metro Editor Gary Jasinek regarding her prominent involvement in an abortion rights demonstration. The editors were aware of that involvement because a reporter and photographer The News Tribune sent to cover the demonstration recognized Nelson among the demonstrators. The editors expressed their displeasure at discovering that Nelson had been on an abortion rights picket line outside a hospital. They explained their belief that as a reporter, it was inappropriate for her to be involved in that degree of political activity. Nelson stated her disagreement with their position and asked what would happen if she were to be involved in something like that again. The editors responded, "We don't know. We hope we don't have to have a meeting like this again."

In August 1990, editors at The News Tribune became aware that Nelson was playing a leadership role in a city-wide political campaign on behalf of the Committee to Protect Tacoma Human Rights. That committee, of which Nelson was a founding member and for which she was communications coordinator, sought to pass an initiative in 1990 that would have reinstated a Tacoma city ordinance protecting gays and lesbians from housing and employment discrimination that had been repealed in 1989. Nelson was responsible for organizing volunteers to get petitions signed and personally collecting signatures. She gathered endorsements from groups like the local labor council, arranged for speakers to go out into the community, and campaigned for the initiative door-to-door. She also helped to organize and attended rallies and demonstrations in support of the campaign.

Both campaigns were major political news stories in Tacoma for many months. Jan Brandt and then Managing Editor Norm Bell met with Nelson on or about August 15, 1990, to discuss her involvement in the human

rights campaign. The editors informed her that because of her political activism on behalf of the Committee to Protect Tacoma Human Rights, she would be transferred to the position of copy editor until after the general election on November 6. The copy editor position, like a reporter, is a nonmanagerial position and requires the same educational qualifications as a reporter. Nelson maintained her salary, benefits, and seniority after the transfer. The News Tribune did nothing to prevent Nelson from engaging in political activity either before or after the transfer, and she continued her activities in support of the initiative up through the November election.

Bell and Brandt again met with Nelson on or about November 12, 1990. They informed her that she would not be eligible for a transfer to a reporter position if she continued to engage in political activism. They offered her the choice to continue such activity and remain a copy editor or to curtail her political activism and transfer back to a reporter position. She refused to modify her political activity in any way and thus was informed that her transfer to copy editor was permanent. Nelson continued to maintain the same salary, benefits, and seniority she enjoyed before the transfer.

Procedural Background.

Nelson filed a request with the National Labor Relations Board to issue an unfair labor practice complaint challenging her transfer and The News Tribune's reliance on the ethical considerations discussed above. The NLRB refused to issue the requested complaint. Two years later, Nelson filed the instant civil suit.

The trial court dismissed Nelson's claims against The News Tribune in which she alleged violations of various provisions of the Washington Constitution and Wash. Rev. Code § 42.17.680(2), which prohibits an employer from discriminating against its employees based on their

support for, or opposition to, political candidates and parties. The trial court concluded that the statute did not apply to a newspaper's efforts to maintain the objectivity of its editors and reporters, but that if the statute were so applied, it would be unconstitutional. On appeal, the Washington Supreme Court found "that RCW 42.17.680(2) does prohibit [The News Tribune] from discriminating against an employee on the basis of the employee's refusal to remain politically abstinent" but concluded that "the statute cannot constitutionally apply to . . . The News Tribune (TNT) under the free press clause of the First Amendment to the United States Constitution." Petitioner's Appendix A ("App.") at A-2.

Nelson has continued her political activities since bringing this action, including testifying to the state legislature on a gay rights bill. She has extensively publicized her dispute with The News Tribune, and has solicited support from former education news sources such as the head of the Washington Education Association and a member of the Tacoma School Board. She remains a copy editor with The News Tribune.

REASONS THE WRIT SHOULD BE DENIED

I. THE WASHINGTON SUPREME COURT'S DECISION IS CONSISTENT WITH, AND FOLLOWS FROM, THE DECISIONS OF THIS COURT.

A. Courts Consistently Interpret the First Amendment to Protect Newspapers' Editorial Discretion to Control the Objectivity, Presentation and Content of Their News Coverage.

This Court's prior decisions support the Washington Supreme Court's conclusion that the First Amendment guarantees the editorial discretion of a newspaper to control the presentation and content of its news coverage by requiring that those persons who research and write its news stories maintain actual objectivity, as well as the

appearance of neutrality, by refraining from political activism. This Court has unequivocally confirmed that the free speech and free press clauses of the First Amendment prohibit government intrusion into a publisher's exercise of editorial control:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (footnote omitted) (invalidating state statute requiring newspaper to print replies of political candidates); *accord Columbia Broadcasting Sys. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973) (holding that FCC properly refused to compel broadcasters to accept political advertising); *see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (parade organizers cannot be compelled to include groups with whose messages the organizers choose not to be associated).

A newspaper's editorial discretion extends not just to what the newspaper says, but to who may say it.

> [P]rotection of the editorial integrity of a newspaper lies at the core of publishing control. . . . At least with respect to most news publications, credibility is central to their ultimate product and to the conduct of the enterprise. [E]ditorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration.

> In order to preserve these qualities, a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity.

Newspaper Guild of Greater Philadelphia v. NLRB, 636 F.2d 550, 560-61 (D.C. Cir. 1980) (footnotes omitted); *see Associated Press v. NLRB*, 301 U.S. 103, 133 (1936) (wire service may "enforce policies of its own choosing with respect to the editing and rewriting of news for publication" and "is free at any time to discharge . . . any editorial employee who fails to comply with the policies it may adopt"); *see generally Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C. Cir. 1984) (refusing to compel newspaper to resume publication of a weekly column that the NLRB found was discontinued in violation of the NLRA).

The News Tribune, like most major newspapers, seeks to protect credibility in the objectivity of its news reporting by requiring that news reporters not engage in political activism. News reporting is credible only as long as it is perceived as objective and unbiased, and "credibility is central to [a newspaper's] ultimate product and to the conduct of the enterprise." *Newspaper Guild*, 636 F.2d at 560. "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Columbia Broadcasting*, 412 U.S. at 117 (plurality op. of Burger, C.J.).

The Washington Supreme Court agreed that "[e]ditorial integrity and credibility are core objectives of editorial control and thus merit [constitutional] protection . . . ." App. at A-23. The court concluded that the "no-conflict-

of-interest policy employed by TNT was expressly designed for the exact purpose of upholding TNT's credibility. This policy therefore merits protection under the free press clauses of the state and federal constitutions." *Id.* at A-24. This conclusion flows from, and is entirely consistent with, the protection this Court has repeatedly afforded the press's exercise of editorial control and judgment over the content of its publication.

B. The News Tribune Did Not Assert, Nor Did the State Court Find, That Newspapers Are Immune From the Application of General Laws.

Nelson ignores these fundamental principles underlying the Washington Supreme Court's decision and seeks to support her Petition with cases that stand only for the proposition that the First Amendment does not shield a newspapers' employment practices from all scrutiny. The News Tribune did not claim, nor did the state supreme court find, that a newspaper is immune from laws of general applicability, including employment discrimination laws. Rather, the state court agreed with The News Tribune that the First Amendment protects a newspaper's editorial discretion to establish and enforce ethical standards that are intended to protect the credibility of the newspaper's content—an issue that was not addressed by any of the decisions Nelson cites.

Nelson principally relies on this Court's decision in *Associated Press v. NLRB*, 301 U.S. 103 (1937). In that case, the Court held that the National Labor Relations Act ("NLRA") did not violate the First Amendment by prohibiting the Associated Press from terminating the employment of an editorial employee because he engaged in union organizing activity. Nelson correctly observes that the Associated Press claimed the need for "absolute and unrestricted freedom to employ and to discharge those who, like the [employee], edit the news," *id.* at 131, but she ignores the Court's refusal to address this claim

on the merits. The Court expressly found that the Associated Press's arguments had "no relevance to the circumstances of the instant case" and that the issue of protecting a news organization's credibility was not before the Court:

> The actual reason for his discharge, as shown by the unattacked finding of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. *These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by [the employee's] continued service, Congress was without power to interdict his discharge. No such question is here for decision.* Neither before the Board, nor in the court below nor here has the petitioner professed such a belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

Id. at 132 (emphasis added).

The Washington Supreme Court, unlike Nelson, properly interpreted this Court's holding in *Associated Press*, explaining:

> The court rested its decision on a finding that unionizing had 'no relation whatever' to Associated Press's news distributing function. Thus *Associated Press* must be distinguished from this case. While internally unionizing a small work force may not impinge on a news publication's credibility and integrity vis-a-vis the outside world, high profile politicized activities of a reporter arguably do. The *Associated Press* case affirmatively supports this view.

App. at A-25 (citation omitted). The Washington Supreme Court correctly observed that "*Associated Press* does not hold that freedom of the press may be violated

by any general law but only [that] *that* general law (the NLRA) did not," and concluded that the "language in *Associated Press* clearly supports this view that TNT's actions were within its constitutionally protected sphere of control of editorial integrity and credibility even though the statute in question is a general law." *Id.* at A-26 (emphasis in original).

Nelson, however, mischaracterizes the Washington Supreme Court's opinion as "ignoring" *Associated Press* because it "was rendered by a vote of 5 to 4." Petitioner's Brief at 19. Far from ignoring this Court's decision, the state court properly limited the holding as applying only to the NLRA and relied on the Court's express reasoning to support the conclusion that a newspaper may take appropriate action to protect the credibility of its news reporting. The Washington Supreme Court remarked on the circumstances surrounding the Court's narrow decision in *Associated Press* only in the context of observing that the "case is limited to the NLRA and union activity" and to further support the state court's belief that it "should not stretch *Associated Press* beyond limits carefully crafted as part of the original text to guide its application." App. at A-26-27. The state court's refusal to extend the Court's decision in *Associated Press* beyond the holding and underlying rationale thus represents proper judicial restraint, not, as Nelson contends, a refusal to follow precedent.

Nor can Nelson find any support in *Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C. Cir. 1984), in which the court of appeals relied on *Associated Press* to hold that the First Amendment does not prevent the National Labor Relations Board from challenging or inquiring into the motives of a newspaper's decision to discipline a columnist for union organizing activities. That court, like this Court in *Associated Press*, addressed only the NLRA and did not consider the issue of First Amendment protection for

a newspaper's ability to safeguard its credibility and objectivity.[2] The court in *Passaic Daily News*, however, held that the First Amendment precluded the NLRB from requiring that the newspaper resume publication of the employee's column. *Id.* at 1556-59. Rather than demonstrating a dichotomy between employment regulation and remedies, as Nelson asserts, the circuit court's conclusion reaffirms this Court's well-established prohibition on government intrusion into the exercise of editorial control and judgment. *See, e.g., Miami Herald*, 418 U.S. at 258. The Washington Supreme Court's decision reaffirms that same principle and is fully consistent with this Court's First Amendment jurisprudence.

II. THE WASHINGTON SUPREME COURT'S DECISION WAS NARROWLY TAILORED TO ENSURE A NEWSPAPER'S ABILITY TO PROTECT THE CREDIBILITY AND OBJECTIVITY OF ITS NEWS COVERAGE FROM A REPORTER'S POLITICAL ACTIVISM.

The Washington Supreme Court held that RCW 42.17.680(2) prohibits an employer from "discriminating against an employee on the basis of the employee's refusal to remain politically abstinent" but, as to reporters and editors, "cannot constitutionally apply to . . . The News Tribune . . . under the free press clause of the First Amendment to the United States Constitution." App. at A-2. Nelson, however, mischaracterizes the court's decision as broadly threatening the rights of all newspaper employees to be free of employment discrimination. The News Tribune did not claim, nor did the state supreme

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[2] Nelson, moreover, does not claim—nor does the record support—any ulterior motive in The News Tribune's editorial standards. To the contrary, the record demonstrates that The News Tribune's editorial standards apply to *all* political activism by reporters, regardless of viewpoint, and that The News Tribune—in its *editorial* pages—expressed support for the gay rights initiative for which Nelson was campaigning at the time of her transfer.

court find, that The News Tribune or any other newspaper is generally immune from employment discrimination laws. The court's holding is narrowly tailored to safeguard a newspaper's ability to protect its credibility and objectivity from a reporter's political activism—a decision of limited scope that raises none of the issues Nelson contends need to be addressed by this Court.

A. The Washington Supreme Court's Decision Does Not Threaten the Applicability of General Anti-discrimination Laws to Newspapers.

Nelson first maintains that the Washington Supreme Court's decision somehow imperils the constitutionality of every federal and state statute that guarantees the rights of employees to be free from employment discrimination, at least as applied to newspaper employees. Nelson, however, fundamentally misinterprets the state supreme court's holding and demonstrates a failure to comprehend the distinction betwen a reporter's *conduct* that is at issue in this case, and an employee's gender, race, national origin and other *immutable characteristics* that have no relevance to Nelson's claim and were not considered in the decision below.

The News Tribune maintains, and the state supreme court found, that a newspaper may protect the objectivity and credibility of its news coverage by enforcing ethical standards that limit a journalist's political activism. Nelson contends that a district court in *Hausch v. Donrey of Nevada, Inc.*, 833 F. Supp. 822 (D. Nev. 1993), reached a different conclusion when it held that the First Amendment did not exempt a newspaper from compliance with Title VII of the Civil Rights Act of 1964 in a suit for gender discrimination brought by an unsuccessful candidate for Managing Editor. Nelson cited the same case below, and the state supreme court properly found that the case was inapplicable because the Nevada district court "noted that the paper had not alleged that its ability to

control the integrity and credibility of the paper had been affected by the antidiscrimination laws." App. at A-27.

More fundamentally, the Washington Supreme Court's decision, unlike the federal district court decision in *Hausch*, addresses ethical restrictions on political activism based on voluntary *conduct*, not on gender, race, or any other immutable physical characteristic. The News Tribune applies editorial standards to protect its objectivity and credibility, and the state court agreed that a newspaper has the right to ensure that both the content and presentation of that news is—and is perceived to be—as free from bias as possible. The court concluded that the First Amendment assures The News Tribune the right to avoid partisan viewpoints in its news coverage by requiring that those who report the news do not engage in publicly visible activity that would undermine The News Tribune's ability to maintain and project its objective voice. This editorial standard concerns *conduct*, not status. Under those standards, a reporter's race, national origin, or gender are irrelevant to whether the reporter is, and is perceived to be, unbiased in her news reporting.

The Washington Supreme Court's decision upholds only The News Tribune's nondiscriminatory editorial standards concerning political activism, which do not extend to making employment decisions based on the immutable physical characteristics that Nelson uses to create her irrelevant parade of horribles. "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press*, 301 U.S. at 132. The Washington Supreme Court has abided by that restriction, and its decision in this case neither raises nor addresses the impact of the First Amendment on the application of Title VII or any other antidiscrimination law as applied to a hypothetical news organization under nonexistent and assumed circumstances.

B. The Ability to Control Actual and Perceived Objectivity Lies at the Heart of a Newspaper's Editorial Control and Judgment.

Nelson also claims that the Washington Supreme Court's decision is inconsistent with *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990). In that case, however, the Court did not even address a newspaper's editorial control and judgment, much less the ability to exercise that control and judgment to protect the credibility and objectivity of a newspaper's news coverage. Rather, the Court held that the First Amendment guarantees of academic freedom do not protect confidential peer review documents from disclosure in response to an EEOC subpoena—a holding that is simply irrelevant to this case. Nelson nevertheless maintains that the Washington Supreme Court's decision, like the University's claim in *University of Pennsylvania*, rests on an attenuated connection to the First Amendment and lacks sufficient factual proof. Nelson's contentions are meritless. A reporter's political activism has a direct impact on a newspaper's ability to maintain the credibility of its news coverage, and this Court does not require proof of damage to credibility as a prerequisite to First Amendment protection.

1. *Integrity and Credibility Are Core Objectives of Constitutionally Protected Editorial Control and Judgment.*

The Washington Supreme Court concluded that "[e]ditorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses" of the federal and state constitutions. App. at A-23. The University of Pennsylvania's claim that responding to a subpoena for confidential peer review materials infringes academic freedom is not even remotely analogous. As this Court explained,

> [The University] argues that the First Amendment is infringed by disclosure of peer review materials be-

> cause disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right.

University of Pennsylvania, 493 U.S. at 199-200. No such remote burden was at issue in this case.

The editorial standards at issue in this case are fundamental to the First Amendment's guarantee of a free press. Objectivity lies at the heart of The News Tribune's presentation of the news, and The News Tribune's requirement that reporters refrain from political activism directly supports the newspaper's actual and perceived objectivity. Reporters' work, in large measure, *is* the content of a newspaper. The reporter researches and writes the first draft of every story printed in the newspaper. Editors may revise that story and decide whether and how it will be printed, but the editors must trust that the reporter fairly and accurately gathered and presented the facts on which the story is based. The editor cannot shadow the reporter as she does her investigation or assign a second reporter to duplicate her work to ensure its accuracy and fairness. As former TNT Assistant Managing Editor Jan Brandt explained in this case,

> The reporter brings the information into the newsroom from the outside. The reporter is the ears and eyes of the story. The editor has to trust the reporter that that is indeed what occurred and how it occurred and where it occurred. The . . . editor . . . can ask for additional information, can ask for balance in a story, can ask for both sides of the story, can question facts, but basically it is a trust relationship between the editor and the reporter.

The requirement that a reporter not engage in political activism ensures such trust—not only between the reporter

and the editor, but between the newspaper, its readers and its sources of news stories. The News Tribune prints the byline of the person who reports the news, as well as the news itself. Just as the newspaper's editors have the discretion to ensure that the news they print is—and is perceived to be—objective, balanced, and fair, so too do they have the right to ensure that the reporter whose byline is printed is—and is perceived to be—objective, balanced, and fair. Even an objectively neutral story will be perceived differently if it is identified as having been written by a partisan reporter or published by a partisan newspaper. The failure or potential failure of the public to distinguish between a reporter and the newspaper for which she works requires that a reporter refrain from political activism on all public issues, not just those on which she reports. Even if a reporter could confine her political activism to events she does not cover,[3] the newspaper's readership, news sources, or advertisers may still associate the newspaper as a whole with her visible partisan activities on a newsworthy issue. Here, for example, a state legislator who knew that Nelson had been a reporter for The News Tribune had to inquire of the newspaper whether she had been acting on behalf of The News Tribune while lobbying in support of proposed legislation.

The D.C. Court of Appeals in *Newspaper Guild Local 10 v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), recognized the inseparable link between a reporter's political activities and a newspaper's constitutionally protected right to safeguard its credibility. That court, like the Washington Supreme Court, affirmed that to preserve credibility and

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[3] The record demonstrates that avoidance would be impossible in this case. The issue of gay and lesbian rights arises in schools, and throughout our educational system, just as it does in other newsworthy segments of society. Nelson, moreover, was not limited to covering education stories but, like all reporters at The News Tribune, was responsible at times for covering whatever story came up—potentially including stories on events or issues in which she has taken a partisan position.

editorial discretion, "a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." *Id.* at 561. The court in that case reviewed an NLRB decision holding that any penalties used to enforce a newspaper's code of ethics imposed on *all* employees—not just reporters, editors, and others who research and write the news—was subject to collective bargaining. The court held that the NLRB had failed to distinguish between provisions that impacted the newspaper's credibility and those that had no such effect. *Id.* at 561-63. The court remanded this determination to the NLRB but observed that restrictions on the political activities of reporters and editorial personnel—as opposed to a general direction to maintenance and circulation employees to avoid conflict of interest—"would appear to be reasonably related to the core concerns of a newspaper's manageemnt." *Id.* at 563.

The issue, therefore, is who decides when an actual or potential conflict of interest sufficiently affects the newspaper's content to disqualify a person from gathering and writing the news. Editorial control and judgment would be a hollow right if courts, rather than editors, determined who could speak for the newspaper and delegated to individual reporters the discretion to decide whether and when their publicly visible political activities affected a newspaper's ablity to present the news in the manner in which the newspaper desires to present it. The Washington Supreme Court thus properly concluded that this Court and the First Amendment have placed such decisions impacting a newspaper's content squarely within the control and judgment of the newspaper's editors.

2. *First Amendment Protection Does Not Depend on Proof That a Reporter's Political Activism Negatively Impacts the Credibility of a Newspaper's News Coverage.*

Nelson also purports to rely on *University of Pennsylvania* to support her position that the Washington Supreme Court improperly failed to require that The News Tribune prove that her activities resulted in actual or perceived bias in her reporting as a prerequisite for First Amendment protection. Again, however, the Court did not even address such an issue in *University of Pennsylvania.* Nor has this or any other Court ever held, as Nelson further asserts, that a person's ability to engage in political activism represents a compelling governmental interest sufficient to overcome the First Amendment in the absence of such proof. The Washington Supreme Court properly dismissed Nelson's claims based on well-founded decisions of this and other federal courts.

"Compelling editors or publishers to publish that which ' "reason" tells them should not be published' is what is at issue in this case." *Miami Herald*, 418 at 256 (citations omitted). The Court has emphatically stated that any such compulsion is unconstitutional, regardless of whether the State agrees with that "reason." *Id.* "Reason" tells The News Tribune not to publish stories by a political activist that could negatively impact the objectivity and credibility of its news coverage. Constitutional protection for that decision is not predicated on the newspaper's ability to prove actual disruption if it were to publish such stories, but on "the exercise of editorial control and judgment," to which the First Amendment dedicates *all* "choice of material to go into a newspaper." *Id.* at 258. This Court thus has specifically rejected Nelson's argument that editors must justify their publication decisions to qualify for constitutional protection. As the Court noted,

> "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a news-

> paper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?"

Id. at 258 n.24 (quoting 2 Z. Chafee, *Government and Mass Communications* 633 (1947)); *accord Columbia Broadcasting Sys. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973).

Nor do Nelson's rights to engage in political activity rise to the level of a compelling governmental interest sufficient to overcome The News Tribune's First Amendment protections. To the contrary, this Court has held that such rights do not even overcome state and federal statutes limiting the off-duty political conduct of government workers, much less the free speech and press protections of the First Amendment. In two companion cases, the Court concluded that the State's interest in ensuring nonpartisan, credible government administration outweighs the rights of its employees to engage in political activities. *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The Court, moreover, did not require proof that these employees' activities negatively impacted government administration or resulted in public perceptions of bias. Rather, the Court simply observed, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Letter Carriers*, 413 U.S. at 565. The circumstances here compel the same conclusion.

The Washington Supreme Court relied on these and other decisions to conclude that "[c]ase law unambigu-

ously allows a news publication to follow a code designed to limit conflicts of interest which may diminish publication credibility. TNT adopted such a code. Freedom of the press leaves such decisions to the press, not the legislature or the courts." App. at A-27-28. Even if no subscribers cancelled their newspaper subscriptions because politically active reporters and editors presented the news, The News Tribune would continue to have the right to control how its news coverage is presented. The First Amendment does not protect speech only to the extent that a medium of expression can prove loss of money or credibility if a court or state legislature purports to limit that medium's editorial control of its content. Nelson's contentions to the contrary find no support in law or fact and provide no basis on which this Court should review the Washington Supreme Court's decision in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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